

**ALEJANDRO ORTIZ**  
Claimant

**NIES CONSTRUCTION, INC.**  
Respondent

**NORTHWESTERN NATIONAL INS. CO.**  
Insurance Carrier

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## ORDER

## APPEARANCES

## RECORD AND STIPULATIONS

## ISSUES

The sole issue to be addressed is the nature and extent of claimant's impairment. The ALJ found claimant sustained a 9 percent functional impairment to the shoulder as a result of his work-related injury, declining to award a non-scheduled injury and/or work disability because he felt claimant had failed to satisfy his burden of proof. Claimant takes

issue with this finding and contends that the medical testimony offered by Dr. Pedro A. Murati, which indicates claimant sustained a general bodily injury in the accident, should be given more credence than the opinions of Dr. Frederick Smith, the treating physician.

Respondent did not appeal the ALJ's Award and argues that the findings made therein should be affirmed as they are substantiated by the record as a whole.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein and the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the ALJ's Award should be affirmed. The ALJ's Award is sufficiently detailed such that a recitation of the facts and conclusions is unnecessary. Accordingly, the findings and conclusions set forth in the Award are hereby adopted by the Board.

Claimant was employed as a laborer who assembled forms for concrete basements. When the concrete had cured, claimant then disassembled the forms and moved on to another job. The forms are large and heavy. On or about February 8, 2001, claimant complained of pain to his thoracic area, but he continued to work until March 1, 2001, when he ceased working. Compensability of his claim is not in dispute.

Claimant was treated conservatively and ultimately referred to Dr. Smith, a psychiatrist. Dr. Smith reviewed x-rays that had been taken and found no bony abnormalities. Dr. Smith also administered nerve conduction tests which revealed no evidence of nerve damage or impingement in the trapezius, infraspinatus or rhomboid area. Some trigger points were identified in the top of the left shoulder and along the left side of the neck and medial border of the scapula which were treated with injections. Ultimately, Dr. Smith diagnosed "left scapular strain and myofascial pain."<sup>1</sup> The pain expressed by claimant during this course of treatment was in the area of the shoulder blade, specifically the muscles that connect and support the shoulder and the scapula.

Dr. Smith assigned a 5 percent permanent partial impairment to the body as a whole which, when properly converted, yields a 9 percent to the shoulder. He also requested a functional capacities test and, following that evaluation, Dr. Smith adopted the restrictions recommended in that report. Claimant was thereafter restricted from more than occasional lifting over 75 pounds to the waist level, and no more than 35 pounds overhead. Claimant was also advised to limit weighted reaching to an occasional basis.

Claimant sought out and offered the opinions of Dr. Pedro Murati, an individual who had seen claimant for a prior workers' compensation injury. Dr. Murati did not review

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<sup>1</sup> Smith Depo. at 4.

claimant's x-rays nor any other radiological evidence generated in connection with the 2001 injury. He did review Dr. Smith's nerve conduction testing but concluded they were "incomplete", although the nature of this insufficiency is not revealed in the record nor did he elect to conduct any nerve conduction studies of his own. During his examination, he found evidence of trigger points from the shoulder girdle and extending towards the neck. He ultimately diagnosed "myofascial pain syndrome affecting the cervical and left interscapular area [and] thoracic strain".<sup>2</sup> He rated claimant at 10 percent to the body as a whole and recommended the same restrictions imposed by Dr. Smith.

The ALJ carefully considered the opinions of both of these physicians and concluded that Dr. Smith's opinions were more persuasive. He made this determination based upon the fact that as the treating physician, Dr. Smith saw claimant over a period of time rather than on one particular day at the request of claimant's counsel. Dr. Smith conducted his own tests, as compared to the lack of any testing done by Dr. Murati. The fact that Dr. Smith initially suggested a body as a whole rating is of no consequence. Nearly any injury can be converted to a whole body rating under the mathematical principles and graphs set forth in the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> ed. ). Dr. Smith's deposition testimony makes it clear that his impairment rating reflects permanent impairment to the left shoulder and the supporting musculature only.

Claimant's impairment is, as found by the ALJ, limited to 9 percent to the left shoulder. He is, therefore, not entitled to any work disability pursuant to K.S.A. 44-510e(a). The ALJ's findings with respect to the task and work loss components were not challenged by either party. Thus, although the findings are moot in light of the finding of functional impairment, they will not be disturbed.

### **AWARD**

**WHEREFORE**, it is the finding of the Board that the Award entered by Administrative Law Judge Bruce E. Moore dated August 5, 2002 is hereby affirmed in all respects.

**IT IS SO ORDERED.**

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<sup>2</sup> Murati Depo., Ex. 2 at 2.

Dated this \_\_\_\_ day of September 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant  
Terry J. Torline, Attorney for Respondent  
Bruce E. Moore, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director